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IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF UNION FOR JOBS AND THE ENVIRONMENT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. CARBON EMISSIONS POSE UNIQUE INTERNATIONAL ENVIRONMENTAL ISSUES THAT REQUIRE DOMESTIC POLICY TO BE CONSISTENT WITH US FOREIGN POLICY 5

A. CO2 is Evenly Concentrated in the Atmosphere Around the World 7

B. Participation by Developing Nations is Essential to Meaningful Resolution 7

C. CO2 Reductions Will Require Reduced Energy Use And Productivity in the US 10

II. THE US HAS A DEFINITIVE FOREIGN POLICY REGARDING CARBON EMISSIONS ESTABLISHED BY THE PRESIDENT AND SUPPORTED BY THE US SENATE 12

A. The President, as Leader of the Executive Branch, Provided Clear Direction Regarding US Foreign Policy on Carbon Emissions 13

B. Congress' Actions Reinforce the President's Foreign Policy on Carbon Emissions 17

III. EPA PLAYS AN INTEGRAL ROLE IN US FOREIGN POLICY REGARDING CARBON EMISSIONS 20

TABLE OF CONTENTS – Continued

Page

A. EPA is Part of a Unitary Executive Branch Implementing the President's Policies and Congressional Directives 20

B. In the Unitary Form of Government, EPA Plays a Critical Role in the Formation and Implementation of Environmental Policy – Foreign and Domestic 21

C. EPA Has Played a Historic and Substantive Role on Carbon Emissions at the Global Level 23

IV. EPA SHOULD NOT BE PRECLUDED FROM CONSIDERING US FOREIGN POLICY REGARDING CARBON EMISSIONS WHEN ACTING ON THE SECTION 202 PETITION 24

A. EPA's Consideration of US Foreign Policy on Carbon Emissions is Entitled to *Chevron* Deference 24

B. EPA's Consideration of US Foreign Policy Regarding Carbon Emissions is Consistent with the Unitary Executive Principle 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

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539 U.S. 396 (2003) 27

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Page

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Page

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Page

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Page

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INTEREST OF AMICUS CURIAE[1]

Unions for Jobs and the Environment ("UJAE")[2] is an association of ten national and international unions whose 3.2 million members seek to have a voice for union and worker concerns regarding United States ("US") global climate change policy and other environmental issues. UJAE member unions are engaged in various aspects of US energy supply production, utilization and transportation.

Since its formation, UJAE has actively engaged in the global climate change issue due to its implications for jobs and job security relative to other nations' workforces. Imposition of emission reductions on US sources would directly affect energy providers and consumers and their workers. For instance, estimates of the costs of achieving the Kyoto Protocol found that the US total production of goods and services could be reduced between $60 and $94 billion (in 1996 dollars).[3] Even more relevant to UJAE's

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of *amicus curiae* UJAE was not authored in whole or in part by counsel for a party, and no person or entity other than the *amicus* and its staff have made a monetary contribution to the preparation of this brief. All parties except the Solicitor General have granted blanket consent for the filing of *amicus curiae* briefs. The letter of consent for filing of this brief from the Solicitor General will be provided.

[2] Formed in 2000, UJAE is a non-profit § 501(c)(4) organization incorporated in Maryland formed of: the Brotherhood of Locomotive Engineers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Teamsters; Marine Engineers Beneficial Association; Transportation Communications International Union; United Food and Commercial Workers; United Mine Workers of America; United Transportation Union; and, Utility Workers Union of America. *See* http://ujae.org.

[3] Energy Information Administration, U.S. Dept. of Energy, *Impacts of the Kyoto Protocol on U.S. Energy Markets and Economic*

concerns was a 1998 estimate indicating that non-farm related employment could be down by 1.1 million jobs by 2010.[4]

Due to the far reaching implications of US decision-making on carbon reductions, UJAE has invested significant resources in participating in the international and domestic arenas to help shape the US position. UJAE is accredited as a non-governmental organization ("NGO") with formal observer status at the United Nations Framework Convention on Climate Change ("UNFCCC" or "Convention"). As an accredited observer to the UN process, UJAE has witnessed firsthand the refusal of the developing nations to commit to emission limitations or reductions, even as these nations expand their energy production, industrial infrastructure and energy use. Given the uneven commitments among sources around the world in direct competition for market share, UJAE supports a US position that ensures that production at US facilities will not be jeopardized or sacrificed in favor of production by foreign emitting facilities.

Having spent significant resources to help achieve the current open and transparent US foreign policy on carbon dioxide emissions, UJAE is adamantly opposed to the Petitioners' backdoor attempt to precipitate unilateral carbon reductions, such as those found in the Kyoto Protocol, through the use of a rulemaking petition. Accordingly, UJAE supports Respondents' arguments, and therefore files this *amicus curiae* brief. This brief argues that it is appropriate for the US Environmental Protection Agency, as an Executive agency with foreign policy resources, experience, and expertise on international environmental

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Activity, at 143 (Oct. 1998), *available at* http://tonto.eia.doe.gov/FTPROOT/ service/oiaf9803.pdf.

[4] Standard and Poors DRI, *The Impact of Meeting the Kyoto Protocol on Energy Markets and the Economy* (July 1998).

issues, to consider such foreign policy in declining to regulate emissions.

SUMMARY OF THE ARGUMENT

As a formal observer in international climate negotiations, *amicus* is well aware of the multiple approaches suggested for the regulation of global greenhouse gases ("GHGs"). However, as an association of manufacturing labor unions, *amicus* is also aware that should unilateral reductions be implemented without the participation of developing countries, the US's economic base will be severely affected without correlative environmental benefit. Therefore, carbon policy should be considered a matter of foreign policy beyond the scope of Clean Air Act considerations.

EPA properly considered US foreign policy regarding carbon emissions in denying the underlying petition for regulation of certain GHGs emitted by motor vehicles under the Clean Air Act ("CAA"), § 202(a)(1). First, GHG emissions are an international issue. Carbon released on one day essentially becomes evenly distributed around the globe within the week. To stabilize atmospheric GHG concentrations, participation by developing nations—given likely growth patterns in energy-intensive activities—is essential. In the absence of participation by developing nations, the US must take a comprehensive approach to global climate change issues rooted in a domestic policy that is consistent with foreign policy.

Second, because developing nations are reluctant to adopt mandatory carbon reductions, the last three US administrations have adopted a clear foreign policy that preserves domestic options in order to maximize leverage against recalcitrant negotiating partners.

Congress has consistently reinforced this foreign policy. Most notably, the Senate has twice voted—in 1997

and in 2005—to advise that the US should not commit to binding reductions under the Kyoto Protocol, or any similar agreement containing binding reductions, that do not include commitments by developing countries or that would result in harm to the US economy. S. Res. 98, 105 Cong. Rec. S8113-8139, 8138 (daily ed. July 25, 1997); Amdt. 817 to H.R. 6, 109th Cong. (2005). Each successive treatment of GHGs by Congress has steered clear of the type of mandatory reductions sought by Petitioners, thus reinforcing a consistent policy judgment.

Third, EPA is essential to the implementation of US foreign policy on carbon emissions. Like every other Executive Branch agency, and consistent with Constitutional principles of a unitary executive, EPA is charged with implementing the President's policies, including foreign policy, and Congressional directives. EPA has led international environmental delegations and played a supporting role in other key summits and conferences—all with US foreign policy firmly in mind.

Fourth, any argument to preclude EPA from considering US foreign policy regarding carbon emissions when acting on the petition belies the need for consistent foreign and domestic policies on carbon emissions, and the integral role of EPA in implementing the US foreign policy on carbon emissions. Moreover, EPA's consideration of foreign policy is entitled to *Chevron* deference in the absence of clear Congressional intent, particularly where it seems inconceivable that Congress intended to delegate a policy decision of such economic and political magnitude to EPA under its Section 202(a)(1) authority. *See FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

Accordingly, if Petitioners' appeal here succeeds in compelling EPA action that would be in direct contradiction of well-established foreign policy, then not only will such domestic policy fail to have the desired environmental effect,

but also the US will have lost valuable leverage necessary to facilitate a truly international response. Therefore, *amicus* respectfully submits that the Court should reject any finding of a non-discretionary obligation on the EPA to regulate GHGs under CAA § 202(a)(1) in light of powerful Constitutional and administrative considerations rooted in definitive US foreign policy.

ARGUMENT

I. CARBON EMISSIONS POSE UNIQUE INTERNATIONAL ENVIRONMENTAL ISSUES THAT REQUIRE DOMESTIC POLICY TO BE CONSISTENT WITH US FOREIGN POLICY.

In the words of former Secretary of State Madeleine K. Albright, "[t]oday environmental issues are part of the mainstream of American foreign policy."[5] No issue demonstrates her point more than carbon dioxide ("CO2") emissions. GHGs, once emitted, are "typically halfway around the world a week later, making climate change a truly global issue." Thomas R. Karl & Kevin E. Trenberth, *Modern Global Climate Change*, 302 Science 1719 (Dec. 5, 2003). Due to the global nature and long atmospheric residence times of GHG emissions, including CO2, states, regions and nations cannot individually effect meaningful change in atmospheric GHG concentrations. *See* T. Wigley,

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[5] Letter from Madeleine K. Albright, Secretary of State, U.S. Dept. of State, Environmental Diplomacy: The Environment and U.S. Foreign Policy, http://www.state.gov/www/global/oes/earth.html (last visited Oct. 23, 2006). Former Secretary Albright also has said, "[W]e have incorporated environmental goals into the mainstream of our foreign policy." Madeleine K. Albright, Secretary of State, U.S. Dept. of State, Statement before the International Relations Committee (Feb. 12, 1998), http://www.fas.org/asmp/resources/govern/fy99albright.html.

et al., *Economic and Environmental Choices in the Stabilization of Atmospheric CO2 Concentrations*, 379 Nature 240 (Jan. 18, 1996).

Carbon knows no boundaries. The conclusion that EPA is prohibited from considering whether its potential domestic regulation of GHGs would impinge on, or conflict with, US foreign policy is simply wrong. First, EPA is the long-standing expert on emissions policy in the Executive Branch. *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981) (noting that EPA is the agency in which "Congress has vested administrative authority" over the "technically complex area of environmental law").

Second, federal agencies have long been expected to be cognizant of, and act consistently with, the foreign policy of the US in regard to environmental issues. For example, the National Environmental Policy Act ("NEPA") states:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall . . . (F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs . . . ."

42 U.S.C. § 4332(2)(F); *see also* 44 Fed. Reg. 1,957 (Jan. 9, 1979) (Sec. 2-4(c) of Executive Order 12114 confirms that federal agencies are not prevented from using additional measures "to further the purpose of the [NEPA] and other environmental laws . . . consistent with the foreign and national security policies of the United States.").

Due to the transnational nature of CO2 emissions, the US domestic and foreign policy regarding GHG emissions must be consistent for either to be effective. As described further below in Sec. I, current US policies are rooted in a

number of scientific, geographic and historical facts and principles.

A. CO2 is Evenly Concentrated in the Atmosphere Around the World.

Unlike most other emissions, which if traced to and abated at the source can result in measurably reduced concentrations in the ambient air over a defined geographic area, GHG emissions from all sources in all nations contribute to an undifferentiated worldwide concentration in the upper atmosphere. *See* 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003); *see also* Thomas R. Karl & Kevin E. Trenberth, *Modern Global Climate Change*, 302 Science 1719 (Dec. 5, 2003). Therefore, the potential benefit of GHG emission reductions made in the US can be thwarted when emitters in other nations increase or refuse to reduce their emissions.

B. Participation by Developing Nations is Essential to Meaningful Resolution.

As former Secretary Albright recognized:

> Industrialized countries must take the lead in reducing greenhouse gas emissions. But the problem cannot be brought under control without the participation of all countries.[6]

The developing world is currently undertaking an intensive expansion of energy infrastructure, and escalating transportation, industrial and commercial expansion to meet

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[6] Madeleine K. Albright, Secretary of State, U.S. Dept. of State, Opening Remarks at the Asian Post Ministerial Conference 10+1 Meeting (July 2000), *available at* http://www.aseansec.org/3899.htm.

the demands of growing domestic and international markets.[7] Building the infrastructure of the developing world and then supplying its needs are energy-intensive activities that will cause rapid growth in CO2 emissions.[8]

Developing regions are projected to contribute over 75% of worldwide CO2 emissions increases from 2003 to 2030.[9] By the early 2020s, the developing nations' combined emissions will exceed the developed nations' combined emissions.[10] Therefore, if the declared goal of the international community to stabilize atmospheric GHG concentrations is to be realized, developing nations must also commit to reducing and controlling emissions.[11] Without the cooperation of developing nations, little or no environmental benefit will accrue to the US as a whole, or to any US state or region, due to domestic reductions from US emitters.

Nations have worked within a treaty framework toward the goal of reducing global concentrations of GHGs since 1992. The UNFCCC established a framework for nations to determine how to accomplish the "aim" of stabilizing worldwide atmospheric GHG concentrations. UNFCCC, May 9, 1992, 1771 U.N.T.S. 107.

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[7] Energy Information Administration, U.S. Dept. of Energy, *International Energy Outlook 2006*, 1-5 (June 2006).

[8] *Id.*

[9] *Id.* at 93. According to Table A10, world carbon dioxide emissions are projected to increase by 18,648 million metric tons from 2003 to 2030, with non-OECD regions increasing emissions by 14,302 million metric tons during that period. *Id.*

[10] Organization for Economic Co-Operation and Development, *World Energy Outlook 2005 Middle East and North Africa Insights*, 92 (2005).

[11] *See* T. Wigley, *et al.*, *Economic and Environmental Choices in the Stabilization of Atmospheric CO_2 Concentrations*, 379 Nature 240 (Jan. 18, 1996).

Based on our experience as observers at the UNFCCC Conferences of the Parties ("COPs"), we have learned that developing nations are reluctant to adopt mandatory carbon reductions. This fact necessitates a US foreign policy with respect to carbon emissions that preserves domestic options in order to maximize leverage against recalcitrant negotiating partners.[12] As explained by the Secretariat of the Convention:

> The fundamental issue that divided developed and developing countries was whether the implementation of the Article[13] should be interpreted as opening up a discussion on commitments for [developing] Parties.

UNFCCC, *Issues in the Negotiation Process - Second Review of Adequacy of Article 4.2(A) and (B) of the FCCC* (May 5, 2003), http://unfccc.int/cop7/secreview.html.

With developing nations unwilling to commit to control their emissions, then-Undersecretary of State for Economic, Business and Agricultural Affairs Stuart Eizenstat asserted the position that:

> We will put on a full-court diplomatic press to bring developing nations into a meaningful role in helping solve the global climate

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[12] UNFCCC, COP, *Provisional Agenda and Annotations*, 2 n.2, U.N. Doc FCCC/CP/2004/1 (Sept. 15, 2004), http://unfccc.int/resource/docs/cop10/01.pdf; UNFCCC, *Report of the Conference of the Parties*, 5, U.N. Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995), http://unfccc.int/cop4/07a01-1.pdf. The COP is the supreme body of the Convention and includes all of the states that have ratified or acceded to the Convention, which identifies developed nations as "Annex I" and developing countries as "Annex II."

[13] The "Article" refers to Article 4.2(d) that provides for a second review of the adequacy of Article 4.2(a) and (b), which include the principle reduction commitments of Annex I Parties.

> challenge. We will accept nothing less, nor would we expect the US Senate to do so. As the President has indicated, the United States should not assume binding obligations under the [Kyoto] [P]rotocol until key developing countries meaningfully participate in meeting the challenge of climate change.

Excerpts of Remarks Before the Senate Committee on Foreign Relations (Feb. 11, 1998).

In 2000, then-Under Secretary of State for Global Affairs Frank Loy, again made clear that:

> Acting alone. . . developed countries cannot stabilize global greenhouse gas concentrations. From a scientific standpoint, meaningful participation by key developing countries is a necessity. Several large developing countries will soon become the world's leading emitters.

Remarks to the American Bar Association Conference (July 20, 2000).

C. CO2 Reductions Will Require Reduced Energy Use And Productivity in the US.

At present, there are no economically feasible or commercially viable technologies to reduce CO2 emissions from fossil fuel-burning stationary sources.[14] According to the US Department of Energy, the US presently depends on fossil fuels for 85% of its energy supply. *See* Energy Information Administration, U.S. Dept. of Energy, *Annual*

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[14] Parties may disagree on the economic feasibility of CO2 reductions, but what is incontestable is that the issue raises national energy, security and foreign relations matters.

Energy Review 2004 (Aug. 2005), at 37. The federal government has been engaged for years in developing technologies to increase energy efficiency and increasing the supply of fuel sources with lower carbon content such as natural gas, and has taken other actions to reduce the nation's dependence on fossil fuels and thereby decrease CO2 emissions. *See generally*, Pew Center on Global Climate Change, *Climate Change Activities in the United States* (2004) (summarizing federal policies on fuel efficiency and renewable energy). In fiscal year 2005, Congress provided $5.2 billion in budget authority and tax incentives related to climate change, including programs to increase energy efficiency, renewable energy and alternative energy sources. Office of Management and Budget, *Federal Climate Change Expenditures Report to Congress*, at 3 (March 2005). For fiscal year 2006, the President's budget proposed expenditures of $5.5 billion for climate change activities. *Id.*

With decades of sizable federal and private-sector investment in developing mechanisms—such as greater fuel efficiency, lower-carbon fuels, and renewable energy—to provide economically feasible alternatives to fossil fuel combustion, only 6% of the nation's energy is derived from renewable or alternative sources. Energy Information Administration, U.S. Dept. of Energy, *Annual Energy Review 2004* (Aug. 2005), at 7. Until these mechanisms are developed into more reliable providers of greater amounts of energy, they are not viable alternatives to most energy-dependent sectors of the economy. Ultimately, reducing the amount of fuel burned——and therefore energy produced—is the only available option for most US sources to reduce CO2 emissions.[15]

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[15] This explains why the actual losses to gross domestic product were projected to be between $102 billion and $437 billion in 2010 for reducing greenhouse gas emissions to levels proposed by the Kyoto

Worldwide emissions data also demonstrate that the challenge to reduce emissions while allowing for economic growth is shared worldwide. For example, despite mandatory reductions required of all EU members, only two of 15 member States (the United Kingdom and Sweden) are on track to meet their Kyoto emission reductions. Press Release, Institute for Public Policy Research, Two Thirds of the EU Countries Set to Miss Kyoto Commitments (Dec. 27, 2005), http://www.ippr.org.uk/pressreleases/?id=1863 (citing and reproducing data from the European Environment Agency).

II. THE US HAS A DEFINITIVE FOREIGN POLICY REGARDING CARBON EMISSIONS ESTABLISHED BY THE PRESIDENT AND SUPPORTED BY THE US SENATE.

For over a decade and multiple administrations, the President, Congress and the federal agencies have set forth—and adhered to—a definitive, established US foreign policy regarding GHG emissions. The US foreign policy has been to participate among nations within the UNFCCC, while raising two core concerns: preserving the health of the US economy and insisting on developing nation commitments.

The US has calibrated its foreign policy to best account for the complexities of the multinational climate change issue. The Executive Branch has positioned the US vis-à-vis other nations of the world to preserve US negotiating power while continuing to seek effective, balanced approaches to the environmental concerns of global climate change.

Protocol (i.e., 7% below 1990 emissions during 2008-2012). Energy Information Administration, U.S. Dept. of Energy, *What Does the Kyoto Protocol Mean to U.S. Energy Markets and the U.S. Economy?* (Oct. 1998).

In 1992, the US signed the UNFCCC, joining 153 other nations in agreeing to work toward the goal of stabilizing worldwide GHG concentrations. The Senate ratified the UNFCCC, committing the US to contribute to achieving that goal. 138 Cong. Rec. 17,150, 17,156 (Oct. 7, 1992). Many developing nations also signed the Convention, yet from the outset, the extent of their obligation to achieve the UNFCCC goals has been unsettled. Developing nations understood that existing technology would not permit them to expand their economies and reduce their energy consumption and GHG emissions, and they have not committed to emission reductions.[16] *See* John R. Justus & Susan R. Fletcher, Congressional Research Service, Resources, Science, and Industry Division, Global Climate Change, CRS IB89005, at 7 (Sept. 7, 2005).

A. The President, as Leader of the Executive Branch, Provided Clear Direction Regarding US Foreign Policy on Carbon Emissions.

In 1992, when signing the UNFCCC Ratification Instrument, President George H.W. Bush signaled his concern with the economic issues raised by committing to the Convention goals: "the United States will continue to lead the world in taking economically sensible actions to reduce the threat of climate change." President's Statement

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[16] Energy consumption and CO2 emissions are related in direct proportion because CO2 is an inescapable natural byproduct of fossil fuel combustion. Absent sequestration of the CO2 emissions, to reduce CO2 emissions, one must reduce fossil fuel consumption, either by decreasing the amount of energy combusted or increasing the efficiency with which energy is utilized. Simply put, to reduce CO2 emissions, one must reduce outputs and productivity. Unlike other emissions, which generally can be controlled by the addition of emission control devices, CO2 emissions reflect the amount of fossil fuel utilized to produce energy.

on Signing the Instrument of Ratification for the UNFCCC, 2 Pub. Papers 1818 (Oct. 13, 1992).

In 1997, President Clinton signed the Kyoto Protocol. However, the President highlighted the US's concern with the lack of developing nation commitments and made clear the position that:

> The United States will not assume binding obligations unless key developing nations meaningfully participate in this effort. . . . If the entire industrialized world reduces emissions over the next several decades but emissions from the developing world continue to grow at their current pace, concentrations of greenhouse gases in the atmosphere will continue to climb.

President's Remarks at the National Geographic Society, 2 Pub. Papers 1408, 1410 (Oct. 22, 1997). In the end, President Clinton did not seek Senate ratification of the binding emissions reductions of the Kyoto Protocol.

In 2001, President George W. Bush reaffirmed that the US would continue that same foreign policy:

> I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy.

Letter from President George W. Bush to U.S. Senators (Mar. 13, 2001).

The US has used its bargaining power to positive effect internationally. The US has concluded binational agreements to work toward UNFCCC goals with nineteen nations and the European Union, which account for 70% of

global GHG emissions. U.S. Dept. of State, U.S. Climate Change Policy (Nov. 19, 2004); *See* White House, Addressing Global Climate Change, http://whitehouse.gov/ceq/global-change.html (last visited Oct. 23, 2006). Even with the continued intransigence of developing nations to commit to emission limits, three major developing nations (China, India and South Korea) have joined a US-led Asia-Pacific Partnership to develop emission reduction strategies through appropriate transfer of technology. *See* The Asia-Pacific Partnership on Clean Development and Climate, U.S. Dept. of State, Work Plan for the Asia-Pacific Partnership on Clean Development and Climate (Jan. 12, 2006).

Consistent with its foreign policy positioning, the US is making progress in reducing domestic source emissions through federally-encouraged nonregulatory approaches. The Executive Branch is working toward a goal to reduce the rate of domestic emissions by 18% by 2012 and is seeking voluntary commitments by US GHG emitters to reduce emissions to meet the goal.[17] *See* White House, Addressing Global Climate Change, http://whitehouse.gov/ceq/global-change.html (last visited Oct. 23, 2006). The largest public corporate greenhouse gas goal-setting program, the EPA's Climate Leaders partnership, represents a broad range of

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[17] Under the UNFCCC, ratified by the Senate, developed nations committed to limit GHG emissions while "taking into account. . . the need to maintain strong and sustainable economic growth. . . ." UNFCCC Art. 4.2(a) (1992), at 7, http://unfccc.int/resource/docs/convkp/conveng.pdf; 138 Cong. Rec. 17,150, 17,156 (Oct. 7, 1992). Given these countervailing considerations, the US has set domestic reduction goals that account for economic growth based on emission rates, i.e., emissions per unit of output. The Kyoto Protocol, not ratified by the Senate, calls for actual emissions reductions. Petitioners seek regulation through actual emission reductions, which may not account for growing populations or economies.

industry sectors from manufacturing to retail, small business to multinationals, and more than $1 trillion in US revenues. Press Release, EPA, Companies Set Aggressive Greenhouse Gas Reduction Goals (Oct. 12, 2006), http://yosemite.epa.gov/opa/admpress.nsf/a8f952395381d3968525701c005e65b5/abaf76a31c93d2e685257205006305cb!OpenDocument. Launched in 2002, Climate Leaders is a key strategy for encouraging organizations to help meet President Bush's goal. *Id.*

Currently, one hundred partners participate in the Climate Leaders partnership program, and 59 of the partners have set emission reduction goals, which account for more than eight percent of total US GHG emissions[18] per year. *See* EPA, Climate Leaders: Partners Web Page, http://www.epa.gov/stateply/partners/index.html (last visited Oct. 23, 2006); Press Release, EPA, Companies Set Aggressive Greenhouse Gas Reduction Goals (Oct. 12, 2006), http://yosemite.epa.gov/opa/admpress.nsf/a8f952395381d3968525701c005e65b5/abaf76a31c93d2e685257205006305cb!OpenDocument. The other Climate Leaders partners are in the process of setting reduction goals. In 2005, five major companies reduced their actual GHG emissions by 10-23%.[19] EPA estimates that GHG reductions by Climate Leaders partners will prevent over 10 million metric tons of carbon equivalents a year. EPA, Climate Leaders: Partners Web Page, http://www.epa.gov/stateply/partners/index.html (last visited Oct. 23, 2006).

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[18] GHG reductions are measured in "carbon equivalents," CO2 having been adopted as a uniform standard of measurement for GHG emissions generally.

[19] EPA, GHG Reduction Goal Achievers, http://www.epa.gov/climateleaders/partners/goalachievers.html (last visited Oct. 23, 2006).

Simply put, the President's non-regulatory, market-based approach to domestic GHG emissions reductions is effectively pushing corporations and financial institutions to focus on implementing climate-related strategies and investing in green technology without jeopardizing the President's foreign policy.

B. Congress' Actions Reinforce the President's Foreign Policy on Carbon Emissions.

While the Senate ratified the UNFCCC, every time it has considered whether sources should be required to reduce GHG emissions either through a treaty or domestic legislation, it has voted against taking that step.

Under the treaty clause of the US Constitution, Article II Section 2, the President is granted the power to "make Treaties," "by and with the Advice and Consent of the Senate . . . ." In 1997, the Senate strongly asserted its "Advice" pursuant to Article II, Section 2 of the US Constitution, when it unanimously adopted Senate Resolution 98, S. Res. 98, 105 Cong. Rec. S8113-8139, 8138 (daily ed. July 25, 1997) ("Byrd-Hagel Resolution") (sponsored by Sen. Robert C. Byrd). The Byrd-Hagel Resolution resolved that the President should not commit the US to the Kyoto Protocol binding emission reductions, and stated that the Senate would not approve any agreement on binding reductions in GHGs that did not include commitments by developing countries as well as industrialized countries, or that would result in harm to the US economy.[20]

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[20] Interestingly, the Byrd-Hagel Resolution also required that "any such protocol or other agreement which would require the advice and consent of the Senate to ratification should be accompanied by a detailed explanation of any legislation or regulatory actions that may be

Both Houses of Congress subsequently adopted successive appropriations and authorization bills prohibiting the expenditure of funds for implementation of the Kyoto Protocol. *See, e.g.*, H.R. 3194, 106th Cong. (1999) (enacted as District of Columbia Appropriations Act for FY 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999)); H.R. 4475, 106th Cong. § 346 (2000) (enacted as Department of Transportation Appropriations Act for FY 2001, Pub. L. No. 106-346, § 346, 114 Stat. 1356 (2000)); H.R. 4811, 106th Cong. § 577 (2000) (enacted as Foreign Operations, Export Financing, and Related Programs Appropriations Act for FY 2001, Pub. L. No. 106-429, § 577, 114 Stat. 1900 (2000)); H.R. 1646, 106th Cong. § 113 (2002) (enacted as Foreign Relations Authorization Act for FY 2003, Pub. L. No. 107-228, §113, 116 Stat. 1350 (2002)).

Mindful of the current efforts to engage the GHG issue on a multilateral level, Congress has consistently rejected domestic legislation mandating GHG reductions. *See, e.g.*, S. 1224, 101st Cong. (1989); H.R. 5966, 101st Cong. (1990). The Senate also voted 43 to 55 against a bill that would have required reductions in 2003. Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003) (co-sponsored by Sens. McCain and Lieberman). Two years later, the Senate voted against required reductions by a wider margin of 38 to 60. Climate Stewardship Act of 2005, S. Amdt. 826, 109th Cong. (2005) (offered as an amendment by Sens. McCain and Lieberman on June 21, 2005 to the Energy Policy Act of 2005, H.R. 6, 109th Cong. (2005)).

In multiple statutory provisions adopted between 1978 and 1990 addressing climate change, Congress has

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required to implement the protocol or other agreement and should also be accompanied by an analysis of the detailed financial costs and other impacts on the economy of the United States which would be incurred by the implementation of the protocol or other agreement." S. Res. 98.

done many things but has never mandated domestic reductions. Congress has consistently funded research and technology development, directed executive agencies to find nonregulatory ways to reduce emissions, and required monitoring of emissions. *See, e.g.*, National Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq.* (establishing national program to study global climate change); Energy Policy Act H.R. 6, § 1605(b), 109th Cong. (2005); 42 U.S.C. § 13,385 (1992) (establishing a voluntary GHG emissions reporting program); uncodified CAA § 821, 1990 Amendments to the Clean Air Act, Pub. L. No. 101-549, § 821(a), 104 Stat. 2399, 2699 (1990) (requiring regulated power producers to monitor CO2 emissions); CAA § 103(g), 42 U.S.C. § 7403 (2000) (directing EPA to conduct research and develop nonregulatory approaches to reduce emissions). Congress has continued supporting this type of legislation. Under the Energy Policy Act of 2005, Congress addressed GHG issues, in part, by establishing a committee to study and integrate GHG intensity reducing technology strategies, and requiring the State Department to report on further integrating into US foreign policy the goal of reducing greenhouse gas intensity in developing countries. Energy Policy Act of 2005, Pub. L. No. 109-58 § 1601, 119 Stat. 594 (2005), codified at 42 U.S.C. § 15,801.

In a recent action, the Senate reaffirmed its concurrence with the President's foreign policy. The Senate voted to include a Sense of the Senate resolution—which was not included in the final legislation—stating the principle that:

> Congress should enact a comprehensive and effective national program of mandatory market-based limits and incentives on greenhouse gases that slow, stop and reverse the growth of such emissions at a rate and in a manner that — (1) will not significantly harm

> the United States economy; and (2) will encourage comparable action by other nations that are major trading partners and key contributors to global emissions.

S. Amdt. 817 to H.R. 6, 109th Cong. (2005) (agreed to by Senate by a vote of 66 to 29 on June 21, 2006); H.R. 6, 109th Cong., § 1612 (agreed to by the Senate on June 28, 2005) (H.R. 6 enacted as Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 1109). This was the first Sense of the Senate resolution on climate change since the Byrd-Hagel Resolution in 1997. As demonstrated by its actions, Congress has deliberately avoided undermining the US international position on carbon emissions.

III. EPA PLAYS AN INTEGRAL ROLE IN US FOREIGN POLICY REGARDING CARBON EMISSIONS.

A. EPA is Part of a Unitary Executive Branch Implementing the President's Policies and Congressional Directives.

This Court has long recognized that the President is the sole organ of foreign policy. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320-21 (1936). EPA—an Executive Branch agency—is "one in the same" as the President, because it is charged with executing the President's policy, including foreign policy, as well as the directives issued by Congress. Furthermore, the notion that one federal agency should make critical decisions without taking notice of how those decisions affect the operations of another federal agency is inconsistent with basic practices of the Executive Branch.

The level of coordination within the Executive Branch is illustrated by the role of the Office of Management and Budget ("OMB"), which is charged with ensuring that

presidential policies are executed in a uniform manner across all Executive Branch agencies. OMB describes its mission in the following manner:

> OMB's predominant mission is to assist the President in overseeing the preparation of the federal budget and to supervise its administration in Executive Branch agencies. . . . In addition, OMB oversees and coordinates the Administration's procurement, financial management, information, and *regulatory* policies.

See White House, OMB Mission, http://www.whitehouse.gov/omb/organization/role.html (last visited Oct. 23, 2006) (emphasis added). Thus, EPA cannot disregard the President's goals and does not act within a vacuum, but must act in accord with the President's policies and mindful of the positions taken by other federal agencies.

B. In the Unitary Form of Government, EPA Plays a Critical Role in the Formation and Implementation of Environmental Policy – Foreign and Domestic.

Since the inception of EPA, its role in international environmental issues touching on foreign policy has been self-evident. The principal roles and functions of EPA would include the establishment and enforcement of environmental protection standards consistent with national environmental goals, without limiting EPA to domestic policy only. EPA, Reorganization Plan No. 3 of 1970 (July 9, 1970). Furthermore, EPA Order 1110.2, which established the initial organization of EPA, called for the establishment of a Director for International Affairs. The role of this director was to be the principal adviser to EPA's Administrator in regard to international programs and activities of the Agency, coordinate and provide services and

advice on international programs to all of the organizational elements of the Agency, and serve as the Administrator's principal representative with other agencies in regard to international functions of the Agency. EPA, Order 1110.2 at 4(d) (Dec. 4, 1970).

Reinforcing the truth of former Secretary Albright's proclamation that environmental issues are part of today's foreign policy, EPA maintains an Office of International Affairs ("OIA"), which leads EPA's efforts to address global environmental issues. Headed by a Presidentially-appointed and Senate-confirmed Assistant Administrator, OIA's staff is a diverse and highly educated group of professionals with extensive international experience. OIA staff includes individuals with past service in the State Department, United Nations, and other international organizations.

The current Assistant Administrator heading OIA, Judith Ayres, at her confirmation noted that:

> As a nation, we have learned that solving global environmental problems related to the atmosphere, the oceans, and the earth's biological wealth requires concentrated international efforts. For the International Office at EPA, environmental gain is sought in the international arena outside our country's boundaries through the Agency's collaboration with the Congress, other federal agencies, scientists, the financial and business communities, NGOs, and philanthropic leaders.

Judith E. Ayres, Assistant Administrator, OIA, EPA, Statement Before the Senate Committee on Environment and Public Works (July 25, 2001).

C. EPA Has Played a Historic and Substantive Role on Carbon Emissions at the Global Level.

EPA has taken a substantive role in furthering US foreign policy through participation in major international environmental initiatives on global climate change. It was the EPA Administrator who led the US Delegation to the "Earth Summit" in 1992 that resulted in the UNFCCC. *See* USDA, The United Nations World Summit on Sustainable Development, http://www.usda.gov/sustainable/background.htm (last visited Oct. 23, 2006). As noted above, OIA works with UNEP, which serves as the focal point for environmental issues within the United Nations and acts as the Secretariat for many multilateral environmental agreements, including the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Trans-boundary Movement of Hazardous Waste. EPA's OIA coordinates the agency's activities in connection with UNEP and its Governing Council, the 30-nation body providing oversight and guidance to the organization.

Judith Ayres not only attended as a member of the US Delegation to the Tenth Session of the COP in Buenos Aires, but she also addressed the Convention. Tenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change, Buenos Aires, Argentina, December 16, 2004, http://www.state.gov/g/oes/rls/rm/2004/39925.htm and http://www.state.gov/g/oes/rls/rm/2004/39910.htm.

The United States Initiative on Joint Implementation, created by President Clinton, was co-chaired by EPA. U.S. Dept. of State, Fact Sheet (June 9, 1995). The Initiative on Joint Implementation was described by the State Department as assisting "in the development of *international* criteria for the partnership projects needed to reduce worldwide greenhouse gas emissions." *Id.* (emphasis added).

The Asia-Pacific Partnership on Clean Development and the Climate (the "Asia-Pacific Partnership") is another example where EPA represents the Executive Branch in an international collaboration in effectuating the President's foreign policy regarding global climate change issues. EPA was also a member of the delegation to the Third Meeting of the Bilateral Climate Change Working Group between the US and Mexico held on August 24, 2006, and to the Fourth Meeting under the US/New Zealand Bilateral Climate Change Partnership held on August 29-30, 2006.

IV. EPA SHOULD NOT BE PRECLUDED FROM CONSIDERING US FOREIGN POLICY REGARDING CARBON EMISSIONS WHEN ACTING ON THE SECTION 202 PETITION.

An argument has been advanced in this case that EPA, an executive agency, should not consider foreign policy when interpreting CAA § 202 of the CAA. *See* Brief of *Amicus Curiae* Albright at 2. In the context of global climate change, however, the issues potentially addressed and the policies potentially advanced in deciding upon Petitioners' petition under CAA § 202(a)(1) are inextricably intertwined with the foreign policy of the US. And, as illustrated above, EPA has played a prominent role in the global climate change debate for decades. EPA should not be expected to turn a blind eye to foreign policy obligations clearly articulated by the US federal government.

A. EPA's Consideration of US Foreign Policy on Carbon Emissions is Entitled to *Chevron* Deference.

Courts reviewing agency decisions based on the agency's interpretation of a statute entrusted to its care apply a two-part test. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The court first asks whether Congress has spoken directly to the issue. If the

answer is "yes," then the matter is ended and the court gives effect to Congress' intent. *Id.* at 842. However, if Congressional intent is unclear, or if there is no discernable Congressional intent, the court asks whether the agency's interpretation of the statute is a permissible construction of the statute. *Id.* at 843.

Under CAA § 202(a)(1), EPA's "judgment" addresses whether motor vehicles emitting greenhouse gases can "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." No policy considerations are expressly laid out in § 202 of the CAA for EPA's deliberation, leaving no discernable Congressional intent for EPA's interpretation. The statute does not address the scope of EPA's deliberations—let alone direct EPA to consider only domestic policy and ignore its knowledge of foreign policy—in addressing petitions filed under § 202, even though Congress and EPA well know the "global" implications of climate change decisions.

Moreover, as noted above, Congress has repeatedly decided to support additional research, collaboration and voluntary reductions in the carbon emissions realm, and rejected legislation that would impose mandatory GHG reductions. EPA's decision on the underlying petition is consistent with these legislative efforts and the caution raised by this Court when regulating in an area that involves unusually significant political issues. *See FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (cautioning that the Court "must be guided . . . by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

B. EPA's Consideration of US Foreign Policy Regarding Carbon Emissions is Consistent with the Unitary Executive Principle.

The power to execute the nation's foreign affairs is expressly vested in the Executive and Legislative Branches. The President enjoys considerable inherent executive power to "make Treaties." U.S. Const. art. II, § 2, cl. 2. As noted above, Congress also has a share in foreign powers related to advice and consent in ratifying treaties. U.S. Const. art. I § 8, cls. 1, 3, 11-14; U.S. Const. art. II, § 2, cl. 2. This Court has historically and recently "acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983), and *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 327 (1994)).

It is axiomatic that executive agencies like EPA carry out the policies of the President and are obligated to act in a manner that is consistent with the President's foreign policy objectives. Indeed, if the EPA acted in any other manner, it would undermine the President's efforts to craft a unified, comprehensive foreign policy. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320-21 (1936) (finding the Executive is "the sole organ of the federal government in the field of international relations").

If Petitioners were to succeed in using their underlying petition to force unilateral reductions in the US, without regard to foreign policy, the US would lose an important source of foreign policy leverage; namely, the ability to insist on commitments by other nations as a precondition for its own GHG reductions. *See Crosby*, 530 U.S. at 376 (finding that forbearance from domestic action constitutes foreign policy because without such forbearance

"the President has less to offer and less economic and diplomatic leverage as a consequence"). Petitioners here seek to use this forum to compel EPA action that directly contradicts existing national policy.[21] Such interference

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[21] In confronting such divergent courses of action in a case involving whether a California state law was preempted by US foreign policy, the Supreme Court concluded:

> The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that . . . the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the [California insurance law] stands in the way of [the President's] diplomatic objectives."

American Ins. Ass'n v. Garamendi 539 U.S. 396, 427 (2003) (citing *Crosby*, 530 U.S. at 386). While reasonable minds may differ on the appropriate direction of US climate change policy, until and unless the Legislative Branch and the President change course, states and private parties should not be permitted to utilize a rulemaking petition to circumvent America's longstanding foreign policy by asserting that an Executive Branch agency is precluded from considering foreign policy.

In another case concerning state law preemption due to a conflict with foreign policy, Congress had passed a law directing the President to proceed diplomatically in developing a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." *Crosby*, 530 U.S. at 369. Massachusetts, one of the Petitioners in the instant case, had adopted its own law forbidding state agencies from contracting with companies tied to Burma. This Court found that the Massachusetts statute obstructed the national foreign policy on various levels. Relevant in *Crosby* was the Court's concern that the state law interfered with the President's ability

to effectuate foreign policy goals through two specific channels of influence: the use of congressionally delegated authority to strategically utilize economic sanctions, and the ability to develop a comprehensive, multilateral strategy among nations. *Crosby*, 530 U.S. at 376.

Most recently and more on point, in another suit brought by Petitioner Massachusetts, various states sought relief from five US emitters of CO2 on the common law theory of nuisance. Judge Preska of the Southern District of New York dismissed the suit on the grounds that the private common law action "presented non-justiciable political questions that are consigned to the political branches." *Connecticut v. Am. Electric Power Co., Inc.*, 40 F. Supp. 2d 265, 274 (S.D.N.Y. 2005). Specifically, the Court held that: "The explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat confirm that making the "initial policy determination[s]" addressing global climate change is an undertaking for the political branches. . . . . Indeed, the questions here "uniquely demand single-voiced statement of the Government's views." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 212 (1962)). UJAE filed an amicus curiae brief in Connecticut v. AEP, which supported the dismissal of the complaint as impermissibly interfering with foreign policy, in that action. The case is currently on appeal before Court of Appeals for the Second Circuit; oral argument was held on June 7, 2006. *See Connecticut v. Am. Electric Power Co., Inc.*, 40 F. Supp. 2d 265, *appeal docketed*, No. 05-5104-cv (2d Cir. Sept. 22, 2005). On appeal, UJAE filed an *amicus curiae* brief supporting affirmance of the dismissal.

In the present case, Congress has spoken with no less force and clarity then it did in the matter decided in *Crosby*. Here, Congress has imposed two significant conditions on the adoption of mandatory CO2 reductions by the nation, which are participation of developing countries and measures that will not materially harm the US economy. Those conditions provide the President with a sizeable amount of "coercive power" to implement foreign policy. Because the US is presently the world's largest emitter of GHGs, in the currency of Kyoto, the US has the greatest ability to cajole developing nations into agreeing to emission reductions.

As discussed in Section I.B. above, developing nations have thus far acted in a block to prevent resolution of that fundamental matter. The US retains leverage on this issue only insofar as Kyoto-like emission reductions are not unilaterally imposed on US sources. "[T]he President's maximum power to persuade rests on his capacity to bargain

would come at a particularly sensitive time internationally. UNFCCC parties have not yet resolved the pivotal issues of whether, when and how developing nations will be bound to emissions limitations. UNFCCC, Provisional Agenda and Annotations, U.N. Doc. FCCC/CP/2004/1, p 2, n. 2, U.N. FCCC, Sept. 15, 2004.

Interference with the prosecution of foreign policy undermines the core principle of separation of powers. Such interference should also be avoided as a matter of statutory interpretation, as this Court has long held:

> In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional, unless its repugnancy to the Constitution clearly appears.

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for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Crosby*, 530 U.S. at 379-80.

As in *Crosby*, Congress has specifically instructed the President to calibrate our national approach to carbon emissions limitations based upon the ability of the US government to exact corollary concessions from developing nations. The Senate, by unanimous vote, instructed that the Executive "should not be a signatory to any protocol" that would "mandate new commitments to limit or reduce greenhouse gas emissions...unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing County Parties within the same compliance period." Byrd-Hagel Resolution, S. Res. 98, 105 Cong. Rec. S8113-8139 (daily ed. July 25, 1997). The relief sought by Petitioners contravenes this explicit instruction by Congress to the President by forcing the very sorts of unilateral emission reductions the Congress expected to be held in abeyance until and unless negotiations produce like-kind reductions from the developing world.

Buttfield v. Stranahan, 192 U.S. 470, 492 (1904); *see also U.S. v. Rumley*, 345 U.S. 41 (1953). As a "corollary of the presumption favoring constitutionality, the fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." Norman J. Singer, Statutes and Statutory Construction, § 45:11 (6th ed. 2000) (citing *U.S. v. Clark*, 445 U.S. 23 (1980)).

If the Petitioners succeed in their demands for the CAA to be viewed as interposing a non-discretionary duty to regulate GHGs, a constitutional issue (separation of powers) would be presented because the President and Congress have clearly stated that the US should not be forced to regulate GHGs. By contrast, an interpretation that does not cause conflict with US foreign policy—the position taken by Respondent EPA—would be consistent with the Court's holdings on appropriate statutory construction.

CONCLUSION

Amicus has been granted observer status in the ongoing multilateral proceedings regarding the appropriate approach to regulation of global GHGs. *Amicus* is also keenly aware that should such regulations be adopted in a unilateral fashion, the chances are great that American working men and women will be severely and adversely affected. These adverse impacts will be endured without correlative environmental benefit because without effective participation by developing countries, there is little chance that any domestic policy will have the desired environmental effect. Therefore, *amicus* respectfully submits that the Court should reject any finding of a non-discretionary obligation on the EPA to regulate GHGs in light of powerful Constitutional and administrative considerations rooted in a definitive US foreign policy.

Respectfully submitted,

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